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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

NO. **76-1187**

THOMAS JOHN RALEY,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

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Petitioner Thomas John Raley prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Special Appeals of Maryland filed in the above entitled case on October 2, 1976 and for which a mandate was issued on October 11, 1976.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported Citation at 32 Md. App. 575, 363 A.2d 261 and appears at Appendix A to this Petition, infra pp. A. 1. The Court of Appeals of Maryland denied Petitioner's Petition for a Writ of Certiorari to the Court of Special Appeals on November 30, 1976.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was filed on October 2, 1976 and a Mandate was issued on October 11, 1976. The Order of the Court of Appeals of Maryland denying the Petition for a Writ of Certiorari was entered on November 30, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether when the jury acquitted Petitioner of two counts of felonious crimes, thus removing from the case one of the essential elements of the corpus delicti required to establish a violation of another count, the use of a handgun in the commission of a felony or crime of violence under which Petitioner was charged, the Court's failure to find the jury's guilty verdict for the handgun violation repugnant to its verdict of acquittal to the first counts was in violation of the Doctrine of Collateral Estoppel as provided by the Fifth Amendment of the United States Constitution.

2. Whether the Trial Court violated the Petitioner's due process rights and guaranty of equal protection of the law by refusing to instruct the jury, as required by Petitioner, concerning the proper and necessary basis for a conviction under the law of the State of Maryland for a handgun violation as provided in Article 27, Section 36B(d) of the Annotated Code of Maryland.

3. Whether the Trial Court's exercise of discretion in imposing for a common law misdemeanor, simple assault, a lesser included offense, a sentence of twenty years, constituting a penalty more severe than the statutory maximum of fifteen years required for the greater offense of assault with intent to murder, a more dangerous crime and a felony requiring more elements of proof and of which Petitioner was acquitted, violated the prohibition against cruel and unusual punishment provided by the Eighth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States which provides in pertinent part:

"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

This case also involves Section 1 to the Fourteenth Amendment of the Constitution of the United States, said section in pertinent part reads as follows:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, the case involves the Eighth Amendment to the Constitution of the United States which reads as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATUTORY PROVISIONS INVOLVED

This case involves four statutory provisions of the State of Maryland which are quoted in pertinent part below. The full text of the below cited sections appear in Appendix B. pp. 16 .

Article 27, Section 36B, subsection d of the Annotated Code of Maryland – Unlawful Use of a Handgun in a Crime of Violence – Any person who shall use a handgun in the commission of any felony or any crime of violence as defined in Section 441 of this Article, shall be guilty of a separate misdemeanor and on conviction thereof shall, in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the Court to impose no less than the minimum sentence of five years."

Article 27, Section 441, subsection e – "The term crime of *violence* means abduction; arson;

burglary, including common-law and all statutory and storehouse forms of burglary, offenses; escape; housebreaking; kidnapping; manslaughter, excepting involuntary manslaughter; mayhem; murder, rape, robbery; and sodomy or an attempt to commit any of the aforesaid offenses; or assault or intent to commit any other offense punished by imprisonment for more than one year."

Article 27, Section 12, ... "every person convicted of the crime of an assault with intent to murder shall be guilty of a felony and shall be sentenced to confinement in the Maryland Penitentiary for not less than two years nor more than fifteen years ... ;"

Rule 756. Advisory Instructions, subsection b -- How Given. "The court may and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law; the court may give its instructions either orally or in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only."

STATEMENT OF THE CASE

Petitioner was charged with Murder, Assault with Intent to Murder, Assault and the Use of a Handgun in a Crime of Violence.

Petitioner entered pleas of not guilty to all charges and requested a jury trial. On July 9, 1975, the jury returned a verdict of not guilty to the charges of murder and assault with intent to murder but guilty to the charges of assault and the use of a handgun in a felony or crime of violence. The Court denied Petitioner's Motion for a New Trial and sentenced him to twenty years in the custody of the Maryland Division of Correction for assault and fifteen years for the handgun violation.

Before the jury retired, the Court instructed the jury regarding the nature of the charges against Petitioner and the burden of proof. As to the charge of the use of a handgun in a felony or crime of violence, the Court advised the jury that, "under the law, Article 27, Section 36B(d), any person who uses a handgun in the commission of any felony or crime of violence shall be guilty of a separate misdemeanor. That is, a separate crime. A handgun shall include any pistol or revolver, or any firearm capable of being concealed on the person, and a crime of violence, of course, will include murder, robbery, rape, or an attempt to commit any of these offenses. The felony charge in this count is murder." (T. 251).

Following the Court's instructions to the jury, both the State and Defendant made closing arguments. Petitioner's counsel argued inter alia that regarding the handgun offense the law specifically says involuntary manslaughter is an exception as well as common law assault.

The jury retired to consider its verdict and returned approximately three hours later with a question to the Court,

i.e. "description of charges to be considered." The Court reread its earlier instructions as to the nature of the charges against the Petitioner and burden of proof.

Before the jury again retired, Petitioner requested that the jury be advised that assault, a misdemeanor, is not a crime of violence and therefore not a basis for conviction under the handgun violation. The Court refused to so instruct.

Approximately two hours later, the jury returned the above stated verdict.

On Appeal to the Court of Special Appeals of Maryland, Petitioner argued that his rights were prejudiced by the Trial Court's failure to grant supplemental instructions to the jury as requested. In addition, Petitioner argued that the Doctrine of Collateral Estoppel barred the Trial Court's acceptance of the guilty verdict for the handgun offense after the acquittal on both felonious counts and that the logical fallacy of the inconsistent verdicts amounted to a denial of Petitioner's Due Process of Law and Equal Protection of the law.

The Petitioner also argued that the Trial Court subjected him to cruel and unusual punishment by sentencing him to a period of twenty years in the custody of the Maryland Division of Correction for common law assault. In addition, this punishment for common law assault, a lesser included offense of the statutory assault of intent to murder of which Petitioner was acquitted and under which at that time a conviction in the State of Maryland carried a maximum penalty of fifteen years incarceration, was beyond the bounds of just discretion and providence of the Trial Court.

The Court of Special Appeals of Maryland found that the Trial Court's instructions fairly covered the nature of the charges and did not mislead the jury in spite of its inconsistent verdict. The Court of Special Appeals also refused to review an earlier decision of the Maryland Court of Appeals, *Ford v. State*, 274 Md. 546, 337 A.2d 81 (1975) which, despite the express wording of the handgun statute referring to a conviction of a felony or crime of violence, determined the statute was a separate and distinct offense from the felony or crime of violence during the commission of which the handgun was used. Thereupon, the Court of Special Appeals, like the Maryland Court of Appeals in *Ford v. State*, concluded that not only was there no inconsistency in the verdict when a jury returned verdicts of acquittal for the two felony charges and guilty for the handgun offense but that an individual could be on trial for the handgun charge without even being accused of the commission of a felony or crime of violence and guilty of assault, a misdemeanor, and not defined as a crime of violence according to Maryland Law.

According to the Court of Special Appeals, no Eighth Amendment rights were violated by the Trial Judge to impose a lengthy sentence for a crime under which he has no limitation by statute or common law and dismissed the illegality of imposing a more severe sentence for a common law offense, assault, than that set by statute for a greater offense, assault with intent to murder, as being without substantive merit.

REASONS FOR GRANTING THE WRIT

Petitioner first argues that the Court's failure to find the jury's verdict of guilty for the handgun violation repugnant to its verdict of acquittal to the two felony charges was used in violation of the Doctrine of Collateral Estoppel as provided by the Fifth Amendment of the Constitution of the United States.

The jury in Petitioner's trial returned a verdict of acquittal for both felonies under which Petitioner was charged. It found Petitioner guilty, however, of unlawful use of a handgun in the commission of a felony or crime of violence. Petitioner contends that a conviction of the handgun offense must be predicated on a conviction of a felony or crime of violence as provided by Article 27, Section 36B(d) of the Maryland Annotated Code and since the jury eliminated one of the elements necessary for a conviction of the handgun offense by its verdict of acquittal for both felonious charges, a conviction for the handgun offense was thereby barred.

In the case, *Dunn v. U.S.*, 284 U.S. 390, 52 S. Ct. 189, 76, L.Ed. 356 (1932), the Supreme Court stated that "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment." To this statement, the Maryland Court of Appeals in *Williams v. State*, 204 Md. 55, 102 A.2d 714 (1954) added that not only is each count of an indictment to be regarded as if it were a separate indictment but "the inquiry must be whether the

evidence is sufficient to support the conviction on that count, without regard to the disposition of the other counts."

It is Petitioner's argument that *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 21 L. Ed. 2d 469 (1970) and *Simpson v. Florida*, 403 U.S. 385, 41 S. Ct. 1801, 29 L. Ed. 2d 469 (1971) have introduced new light to this thinking. In Petitioner's case, the evidence is not sufficient to convict him of the handgun offense alone, without proof of a crime of violence or a felony which is one of the elements of the offense, as provided by the statute. Without that element, a conviction on the handgun offense cannot stand. There can be no confidence in the verdict of guilty of the handgun offense when the jury, by its acquittal of the Petitioner of one crime, appeared to have rejected the only evidence that would support a conviction of another.

In the case, *Sealfon v. U.S.*, 332 U.S. 575, 68 S. Ct. 237, 92 L. Ed. 2d 180 (1948) an acquittal by a jury on a charge of conspiracy to defraud the United States by presenting false invoices and making false representations to a ration board was held to preclude a subsequent prosecution for commission of the substantive offense, aiding and abetting the uttering and publishing of false invoices, which were introduced in the conspiracy trial.

Petitioner argues that his case is such a situation where reversible inconsistency should result because of the repugnancy of the verdict of guilty in view of the facts as determined from the verdicts for acquittal. Both verdicts were based on the same incident and proof of the exact same facts.

In both *Ashe v. Swenson, supra* and *Simpson v. Florida, supra*, it was held that the Doctrine of Collateral Estoppel constitutionally foreclosed the relitigation of an issue tried in another trial. Treating the fourth count, the handgun offense, in the Petitioner's indictment upon which he was found guilty, as a separate indictment on which he might have been entitled to a trial separate from the trial on the murder and assault with intent to murder counts, it would follow, under the holdings of *Ashe v. Swenson, supra*, and *Simpson v. Florida, supra*, that Petitioner's acquittal on the murder and assault with intent to murder counts would have collaterally estopped the State from thereafter trying him, upon the same evidence, for using the handgun in the commission of the same felonies, as charged in a count, as if it were a separate indictment.

Furthermore, the history of the statute under which Petitioner was convicted for the handgun offense shows the clear intent of the Legislature to be that the offense prohibited by Article 27, Section B(d) of the Maryland Annotated Code, the use of a handgun or the commission of a crime was chargeable only when combined with a charge of having also committed one of the delineated crimes, i.e., the commission of a felony or one of the defined crimes of violence as specified in Article 27, Section 441 (e). That Section of Article 27 is applicable only when a person is also charged and convicted of committing a felony or one of the enumerated crimes of violence.

When the Maryland General Assembly, by Chapter 13 of the Acts of 1972, enacted a completely new handgun law, it

set forth in its declaration of policy that there had been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involved the use of handguns; that the result had been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity; that the laws currently in force have not been effective in curbing the most frequent use of handgun and perpetrating crimes; and that further regulation on the wearing, carrying and transporting of handguns are necessary to preserve the peace and tranquility of the State and protect the rights and liberties of its citizens. See Maryland Code (1957, 1971 Repl. Vol., 1974 Cum. Supp.) Article 27, Section 36B(a)(i).

The law which grew from the Legislators' concern, Article 27, Section B(d) is captioned "Unlawful use of handgun in commission of crime." It provides that it is a separate misdemeanor for any person to use a handgun in a felony or a crime of violence. The statute further provides that "in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor" one adjudged guilty shall be sentenced mandatorily to a minimum sentence of five years.

The statute provides for a mandatory, not discretionary sentence and one expressly in addition to that imposed for the perpetration of the felony or misdemeanor, as described, not for any other offenses.

Petitioner concludes that by the way the statute is defined, there is no way the punishment it provides, as a count, could be viable as a separate indictment or treated as such. The Legislature clearly and unambiguously has limited the statute's use and application to particular situations and it is beyond the power of the court, without further legislative action, to alter its content, purpose or function.

Secondly, the Petitioner contends that the failure of the Trial Court to give, at Petitioner's request, supplemental instructions to the jury was a denial of due process and equal protection of the law, as provided by the Constitution of the United States.

Briefly stated, the facts from which the issue arose that the Petitioner now contends are that in his trial after the jury had received advisory instructions and retired to consider its verdict (T. 245), the jury returned with a question to the Court, i.e. "description of charges to be considered". The Court reread its earlier instructions as to the nature of the charges against the Petitioner and Burden of Proof.

In regard to the fourth count of the indictment which charged the Petitioner with the handgun offense, the Court advised the jury that "under our law, Article 27, Section 36B(d), any person who uses a handgun in the commission of any felony or a crime of violence, shall be guilty of a separate misdemeanor. That is, a separate crime. A handgun shall include any pistol or revolver, or any firearm capable of being concealed on the person, and a crime of violence, of course,

would include murder, robbery, rape or an attempt to commit any of these offenses. The felony charge in this Court is murder (T. 251)".

The Court refused Petitioner's request for a supplemental instruction that assault under which Petitioner also had been charged was a misdemeanor and not a crime of violence and therefore not a predicate for conviction under the handgun violation.

The jury returned verdicts of not guilty on the two felony counts under which Petitioner was charged but found Petitioner guilty of common-law assault, a misdemeanor, and the handgun violation referred to above.

Petitioner contends that the requested instruction was proper and concerned a point of law essential to the crime charged which had not been covered adequately by the Judge. The fact that the jury requested additional instructions was evidence of the fact that the jury was not certain regarding the nature of the charges and was confused concerning their ability to reach a verdict on the charges. The Judge's repetition of what he had said to these twelve individuals only three hours earlier would not have been of much assistance. The Judge resisted any suggestion of additional assistance by denying Petitioner's request for supplemental instructions.

That the jury was not clear concerning the law of the State of Maryland and the charges against the Petitioner is further evidenced by the verdicts rendered. The jury found

the Petitioner not guilty of two felony counts under which he was charged and yet guilty of a handgun violation. According to the statute, a conviction of this handgun offense must be based upon the commission of a felony or crime of violence. Petitioner was not convicted of any felony or such crime of violence as defined by statute. Petitioner contends that one of the tests for determining the prejudicial character of error in instruction is the correctness of the result.

Article 27, Section 36B(d) of the Annotated Code of Maryland prohibits the use of a handgun in the commission of any felony or any crime of violence, as defined in Article 27, Section 441 of the Annotated Code of Maryland (Appendix A. 16). Since common-law assault is a misdemeanor and since it is not listed as a crime of violence, it cannot be the basis for a conviction under the handgun offense. The denial of an instruction to this effect by the Court was in violation of the Court's obligation to the Petitioner as provided by state law, and was plain and reversible error, clearly material to his defense and prejudicial to his rights.

Under Rule 756 of the Maryland Rules of Procedure, "the Court may and at the request of any parties, shall give such advisory instructions to the jury as may correctly state the applicable law." In *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1961), the Maryland Court of Appeals held that "Rule 756(b) makes it mandatory upon the Trial Court to advisably instruct the jury. Section F of the Rule further provides that a party may object to the failure to give any instruction or to an inadequate one."

Petitioner concedes that, in this instance, the request concerned supplemental jury instructions, and not advisory instructions given prior to the time the jury retires to consider its verdict. The Petitioner first requested that the jury be instructed that assault could not serve as the basis for a conviction for the handgun charge when the jury returned to receive additional instructions. However, the Maryland Court of Appeals has applied the same standards to supplemental jury instructions as original instructions. In the case, *Larkin v. State*, 183 Md. 274, 37 A.2d 340 (1944), the jury retired and then returned to ask for further instructions, just as in the Petitioner's trial. The Court held that there is "no more restriction upon the right of the Court to instruct then, than there is upon his right to instruct before the jury retires for the first time."

Petitioner recognizes the Supreme Court's determination in the case *Agnew v. United States*, 165 U.S. 36, 17 S. Ct. 235, 41 L. Ed. 624 (1897) that the Trial Court is not bound to accept language which counsel employ in framing instructions. However, Petitioner here refers to the case, *Bird v. United States*, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570 (1901), where the Supreme Court stated that, "It is well settled that the Defendant has a right to a full statement of the law from the Court, and that a neglect to give such full statement when the jury consequently fell into error is sufficient for reversal." The exception to the Trial Court's instructions to the jury in *Bird v. United States*, *supra*, was taken because the remarks concerning the offense of homicide made no mention concerning the question of self-defense which was the fundamental issue in the case.

Petitioner contends that the right to a full statement of the law from the Court to the jury as stated in *Bird v. United States*, *supra*, is one provided by the Constitution of the United States, and that to deny a Defendant of this right is a denial of the fundamental rules and forms of due process established to guarantee the rights of individuals in legal proceedings. To allow a jury to be misinstructed or inadequately instructed is to obstruct the deliberations of the jury in reaching a verdict and giving the Defendant the full benefit of the law.

Furthermore, it is a denial of the equal protection of the laws for a Court to arbitrarily prevent statements or explanations of the law to reach the jury without consideration to past precedents and the significance of jury instructions as applied to other Defendants.

In the case, *Burton v. United States*, 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482 (1904), the Supreme Court said such situations where the jury is confused and unable to agree are where the most extreme care and caution are necessary in order that the legal rights of the Defendant can be preserved. The Court further stated that, "Considering the attitude of the case as it existed when the jury returned into Court for further instructions, we think the Defendant was entitled, as a matter of legal right, to the charge asked for in regard to the previous requests to charge."

The importance of the Court's instructions to the jury and its role in administering assistance to the jury so it can reach a just and proper verdict was further emphasized in

Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 180 (1946), whether the Supreme Court said, "The influence of the Trial Judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the Judge's last word is apt to be the decisive word."

Finally, the Petitioner contends that the Trial Court violated his Constitutional guarantee against cruel and unusual punishment by imposing a twenty-year sentence for simple assault, a common-law misdemeanor and here, a lesser included offense, after the Trial jury acquitted him of the greater offense of assault with intent to murder, a statutory felony with a maximum punishment of fifteen years as of that time. (The maximum penalty has since been raised to thirty years.) Simple assault, as a common-law misdemeanor, has no statutory maximum. Sentencing is left to the discretion of the Trial Judge, with the only restriction being that the sentence cannot be cruel or unusual in violation of the Eighth Amendment of the United States Constitution. To sustain a conviction for assault, it is only necessary to prove that an assault occurred. To sustain a conviction for the statutory crime of assault with intent to murder, it is necessary to show not only an assault, but also the additional element of malice. *Bird v. State*, 231 Md. 432, 190 A.2d 804 (1963).

The Court of Special Appeals of Maryland, in upholding the Petitioner's twenty year sentence for simple assault, relied conclusively on *Roberts v. Warden*, 242 Md. 459, 219 A.2d 254 (1966). In deciding a Writ of Habeas Corpus, the United States District Court for the District of Maryland determined

that Roberts' twenty year sentence for simple assault was unconstitutional. 404 F. Supp. 119 (1975). Factors considered were the nature and gravity of the offense, legislative purpose behind the penalty, comparison of maximum penalty for simple assault in Maryland against the maximum in other states and comparison with other maximum sentences in the state for comparable crimes. As to the seriousness of the offense, a twenty-year sentence could not be justified in that "the greatest offense charged by the prosecution — assault with intent to murder — was deemed by the Legislature of the State of Maryland to warrant a maximum penalty of fifteen years confinement". Legislative content "cannot be divined" by the Court, in that Maryland establishes statutory penalties for a wide range of assaults but makes no mention of simple assault. A comparison of Maryland's penalty for simple assault with other states only reveals that Maryland's "virtually unlimited sentencing power for simple assault places it at the upper extremes in this Country". As to other maximum sentences for comparable state crimes, Article 27 of the Annotated Code of Maryland 1971 Replacement Volume provides the following offenses and penalties:

Section 384 Mayhem, eighteen months to ten years;

Section 385 Malicious Injury with Intent to Disfigure, two to ten years;

Section 386 Unlawful Shooting with Intent to Maim Disfigured, Disabled, two to ten years;

Section 387 Manslaughter, ten years;

Section 12 Assault with Intent to Have Carnal Knowledge of Female Child under Fourteen Years, two to ten years; Assault with Intent to Rob, two to ten years; Assault with Intent to Murder, two to fifteen years; Assault with Intent to Rape, two to twenty years or life imprisonment.

In *Roberts, supra*, the District Court concluded that "the twenty-year sentence for the lesser-included offense of simple assault where the maximum penalty for the more aggravated offense of assault with intent to murder was fifteen years is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments".

Other states have considered the question of sentencing on a lesser included offense which allows a more severe penalty than the greater offense charged. These states seem to uniformly agree that a Trial Court cannot impose on such a lesser offense a sentence greater than allowable under the greater offense. [See *People v. Schuern*, 111 Cal. Rptr. 129, 516 P. 2d 833 (1973); *Hobbs v. State*, 253 Ind. 195, 252 N.E. 2d 498; *Cannon v. Gladden*, 203 Or. 629, 281 P. 2d 283 (1955).]

Maryland's view, imposing no correlation limit on a lesser offense as opposed to a greater offense, can result in arbitrary injustice. In the Petitioner's case, such injustice did in fact occur. The Petitioner was penalized by successfully defending his case before the jury as to the additional required element of "malice" as to assault with intent to murder. Because he was acquitted of the greater offense, the Petitioner received twenty years, even though he could have admitted guilt to the

greater offense and received only fifteen years. The result of Maryland's view is a decided chilling effect in which an accused is deterred from asserting his basic trial rights for fear of a greater punishment. Similarly, the opportunity for prosecutorial misconduct is obvious in that the State can easily circumvent Legislative intent by proceeding under a common-law misdemeanor with an open-ended sentencing prerogative as opposed to being limited by Legislative enactments.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner for a Writ of Certiorari should be granted.

Richard W. Moore

Attorney for Petitioner.

APPENDIX A

OPINION OF MARYLAND COURT
OF SPECIAL APPEALS
OF OCTOBER 11, 1976
NO. 800, 32 MD. APP. 575, 363 A.2d 1261

On March 24, 1975, the appellant, Thomas John Raley, was indicted by the Grand Jury of Baltimore County. The four-count indictment charged that on February 17, 1975, the appellant 1) murdered one Joseph Stephen LeFevre; 2) assaulted his wife, Linda Agnes Raley, with intent to murder her; 3) assaulted Linda Agnes Raley; and 4) unlawfully "used a handgun in the commission of a felony or a crime of violence as defined in Section 441, of Article 27, of the Annotated Code of Maryland, to wit: murder;...."

The events leading to the indictment can be briefly stated: At about 4:15 A.M. on February 17, 1975, appellant telephoned the Baltimore County Police Department to say that two people had been shot at his home in Baltimore County. After the telephone call was received, Officer Fisher called back to the Raley residence and was told by Raley that he had shot his wife in the chest and a man in the chest. Officer Beatty was dispatched to the address given by Raley, arriving there at 4:27 A.M. Upon arrival, he saw Raley standing in the doorway with a gun in his hand. Raley told Officer Beatty, "I am the one that called you, I shot them both". Upon entering the house, the officer found the victims, LeFevre and Mrs. Raley, lying on the floor, both fully clothed. LeFevre was dead with a bullet hole in his chest. Mrs. Raley had a bullet wound in her throat but was alive and eventually recovered. Officer Glos arrived at the scene shortly after Officer Beatty arrived. Raley gave to Officer Glos two spent revolver casings and three unspent bullets. Officer Glos heard Raley

A. 2

say, "They both came out of the kitchen" and that he "shot them both", and, "They didn't belong there like that". These statements were not elicited from Raley by any questions put to him by anyone and were made in the kitchen of the home shortly after Officer Glos' arrival. A baby-sitter whom Mrs. Raley had engaged for the evening testified that Raley and his wife had been separated for about four weeks prior to February 17, 1975, but that Raley had been out with his wife and spent the night with her February 14, 1975.

Mrs. Raley was called as a witness for the state but refused to testify against her husband; Raley elected not to testify in his own defense.

On July 9, 1975, after three days of trial before a jury in the Circuit Court for Baltimore County (Judge John N. Maguire presiding), appellant was found guilty on Count III (assaulting his wife) and Count IV (using a handgun in the commission of a crime of violence), but was acquitted of Count I (murder of LeFevre) and Count II (assault with intent to murder his wife). On July 31, 1975, Judge Maguire sentenced appellant to the custody of the Division of Correction for twenty years as to Count III and for fifteen consecutive years as to Count IV.

In this appeal, appellant seeks reversal of both convictions of several grounds. We conclude there is merit in none and shall affirm both convictions.

I

The first five grounds alleged are related to the property of the handgun conviction under Count IV of the indictment.

A. 3

(a)

In his advisory instructions to the jury concerning Count IV of the indictment, the trial judge said:

"The fourth count of the indictment charges the Defendant with the Use of a Handgun. Under our law, Article 27, section 36B, subsection d, any person who uses a handgun in the commission of any felony or crime of violence, shall be guilty of a separate misdemeanor. That is a separate crime. A handgun shall include any pistol or revolver, or any firearm capable of being concealed on the person, and a crime of violence, of course, would include Murder, Robbery, Rape, or an attempt to commit any of those offenses. *The felony alleged in this Count is Murder.*" (Emphasis Added)

No exceptions were taken to this instruction. After deliberating for nearly three hours, the jury sent out a question to the court concerning a "description of charges to be considered". After conferring with counsel, the jury was brought back to the courtroom and the judge "re-read" to the jury "all the charges with respect to this case of Thomas Raley", including a word-for-word repetition of his advisory instruction concerning Count IV. When the judge completed the re-instruction, appellant's counsel said to the judge:

".... They asked for charges, and the Court defined as the fourth count Use of the Handgun. The law specifically says Involuntary Manslaughter is an exception as well as Common Law Assault. It was covered in argument. I would ask that the Court indicate that Involuntary Manslaughter and Assault are specifically excepted from the crime of Handgun Violation."

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The judge declined to supplement the advisory instruction as requested.

(b)

Appellant contends the judge's refusal constituted reversible error. We disagree. Section 36B (d) of Article 27 of the Code provides:

"(d) Unlawful use of handgun in commission of crime. — Any person who shall use a handgun in the commission of any felony or any crime of violence as defined in §441 of this article, shall be guilty of a separate misdemeanor and on conviction thereof shall, in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years."

Section 441 (e) of Article 27 provides:

"The term 'crime of violence' means abduction; arson; burglary, including common-law and all statutory and storehouse forms a burglary offenses; escape; housebreaking; kidnapping; manslaughter, excepting involuntary manslaughter; mayhem; murder; rape; robbery; and sodomy or an attempt to commit any of the aforesaid offenses; or assault with intent to commit any other offense punishable by imprisonment for more than one year."

Appellant argues, correctly of course, that "common law assault is a misdemeanor and since it is not listed as a crime of violence, it cannot serve as the basis for a conviction under the handgun violation charged in the indictment". It does not follow, however, that it was error

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not to give the requested advisory instruction. Although it is well settled that under Maryland Rule 756 a trial judge, when requested in a criminal case, must give advisory instructions on every point of law essential to the crime charged and supported by the evidence, *Christensen v. State*, 274 Md. 133 (1975); *Mumford v. State*, 19 Md. App. 640 (1974); *Byrd v. State*, 16 Md. App. 391 (1972); *Peterson v. State*, 15 Md. App. 478 (1972); *Hardison v. State*, 226 Md. 53 (1961), it is equally settled that a trial judge is not obliged to give a requested instruction that is fairly covered in the instructions actually given, and the jury was not misled upon the subject. *Bartholomey v. State*, 260 Md. 504 (1971); *Brown v. State*, 222 Md. 290 (1960); *English v. State*, 21 Md. App. 412 (1974).

In the present case, under Count IV of the indictment the appellant was charged with the "commission of a felony or a crime of violence . . . to wit: murder". Thus charged, a prerequisite to conviction thereon was proof beyond a reasonable doubt that the appellant used a handgun during the commission of a murder or the lesser included felony or "crime of violence" of voluntary manslaughter. We think this element of the handgun charged was fairly covered by the trial judge's advisory instruction actually given and that the jury was not misled into believing that common law assault could serve as a basis for conviction under that count of the indictment. Having advised the jury of the essential elements of the handgun crime charged, it was not necessary to advise it of elements *not* included in the charge.¹

¹ We further observe that the requested instruction, technically, is not a correct statement of the law, for although involuntary manslaughter is not included within the definition of a "crime of violence" under §441(e) of Article 27, it is a felony and therefore is not "excepted from the crime of Handgun Violation". See *Wilson v. State*,

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The appellant contends that the jury verdicts of guilty as to Count IV and not guilty as to Count I (murder in the first or second degree, or manslaughter) and Count II (assault with intent to murder) are fraught with such inconsistency as to amount to a denial of due process of law and equal protection of the law. The verdict as to Count IV, he argues, should therefore be stricken. While we recognize the logic of appellant's argument, we think the decision of the Court of Appeals, in *Ford v. State*, 274 Md. 546 (1975) is dispositive of the contention. In that case the jury returned not guilty verdicts as to counts in an indictment charging robbery with a dangerous and deadly weapon, robbery, and assault, but guilty of a count charging unlawful use of "a handgun in the commission of a crime of violence". Answering Ford's argument that the conviction was illegal because of the allegedly inconsistent verdicts, the Court said, at pp. 550-551:

"We agree with the petitioner that section 36B(d) requires the trier of fact to determine beyond a reasonable doubt, from the evidence, that the accused used a handgun during the commission of either a felony or a crime of violence as a prerequisite to being convicted of unlawfully using a handgun in the commission of either. Nevertheless, in answering the petitioner's first contention, we think it to be plain from the language of section 36B(d) that the offense delineated in that statute is separate and distinct from the felony or crime of violence during the

¹ (Continued)

28 Md. App. 168, 179 (1975). And common law assault, although not included within the definition of a crime of violence, is not "specifically excepted from the crime of Handgun Violation". (Emphasis added). Our decision, however, is not based on this technicality.

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commission of which the handgun was used. Since this is so, an individual on trial for the handgun charge does not necessarily need to have been separately accused of the commission of a felony or crime of violence in an additional count or indictment before he can be charged with or convicted of the crime established in section 36B(d). *And, when the trier of fact considers an indictment containing both a section 36B(d) handgun count and a felony or crime of violence count, a conviction on the former can still be sustained even if the trier of fact returns a finding of not guilty on the latter — in fact, a finding of guilt under both, since they are not inconsistent, can each stand.* A logical corollary then of each of these statements is that when section 36B(d) dictates that any person who is guilty of the handgun offense shall be sentenced "in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor," it directs that irrespective of the number of years, if any, the defendant receives for the 'said felony or misdemeanor,' the court must impose a penalty, within the limitations for confinement contained in the statute, for the independent handgun offense." (Emphasis supplied.)

(c)

Appellant argues that the evidence was insufficient to support the handgun violation because the State failed to meet its burden of proving "beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue was properly presented in a homicide case". As we have seen, the fact that the jury found appellant not guilty of murder, manslaughter, or assault with intent to murder, does not affect the validity of its guilty verdict as to the separate crime of unlawful use of "a handgun in the

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commission of a felony or crime of violence...to wit: murder", contained in Count IV of the indictment. There must, nevertheless, be sufficient evidence from which the jury could have found beyond a reasonable doubt that the appellant used the handgun during the commission of a felony or a crime of violence — in this case murder (in the first or second degree) or voluntary manslaughter. Even if it be assumed that an issue of mitigation was generated (and we do not decide that it was), and that the State failed to prove the absence of the mitigating circumstances ("heat of passion on sudden provocation"), the effect would have been merely to reduce the underlying crime, during the commission of which appellant used a handgun, from murder to the lesser included felony or crime of violence of voluntary manslaughter. In short, our review of the record convinces us that there is ample evidence from which the jury could have found beyond a reasonable doubt that appellant unlawfully used a handgun in the commission of, at the very least, voluntary manslaughter. Such evidence is legally sufficient to support a conviction under Count IV of the indictment.

(d)

Appellant next contends the trial judge erred in "refusing to allow into evidence qualified psychiatric testimony" from Dr. Charles Rafky. After his arrest on February 17, 1975, appellant was ordered by a District Court judge to seek psychiatric treatment as a condition for pre-trial release on bail. He first saw Dr. Rafky on February 20, 1975, "for about one hour". After obtaining his "history" the doctor recommended that he be admitted to a psychiatric hospital for treatment. Approximately a month later he was released from the hospital and Dr. Rafky saw him thereafter "on two occasions".

Appellant did not enter an insanity plea to the charges against him.

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Appellant argues that the testimony of Dr. Rafky that was rejected by the court would have shown that at the time appellant shot LeFevre 1) he did so without the premeditation required for murder in the first degree and 2) he acted in the "heat of passion" so as to reduce the killing to manslaughter. Here again, even if the testimony had been admitted into evidence and even if it had the effect of reducing the underlying felony or crime of violence from murder to voluntary manslaughter, it would not have had the further effect of adversely affecting the legal sufficiency of the evidence for conviction under Count IV of the indictment. Thus, assuming without deciding that the trial judge erred in rejecting the doctor's testimony, the error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638 (1976).

(e)

Appellant's contention that the trial judge erred in refusing to instruct the jury that "the burden of proof of the State must be to prove beyond a reasonable doubt that the Defendant did not act in heat of passion" is likewise unavailing to him; for even if error (and we need not so decide), the error was harmless beyond a reasonable doubt so far as conviction under Count IV is concerned. *Dorsey v. State, supra*.

II.

Appellant contends the State failed to establish the *corpus delicti* of the crime of assault, arguing that "no medical records were entered into evidence describing any injuries to Linda Raley". The contention is devoid of merit. In addition to appellant's confession, there is in evidence the uncontradicted testimony of Officer James Beatty describing Mrs. Raley's condition when he arrived on the scene:

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"She was lying on her right side clutching at her throat, had a bullet wound in the throat. Mr. LeFevre, I tried to check him as soon as possible, and I could detect no pulse and no breathing."

III.

After a hearing out of the presence of the jury, the trial judge ruled that appellant's unsolicited oral confession to Officer Joseph Glos was admissible. Appellant contends, for the first time on this appeal, that the judge made his ruling "without affording the Appellant an opportunity to present witnesses on his Motion or to testify himself" and that "The Court's action deprived the appellant of a full and ample opportunity to assert his Constitutional guarantees". The contention is not supported by the record. After Officer Glos had testified on direct examination concerning the events leading up to the confession, and after appellant's counsel had completed his cross-examination of the officer, the record shows the following:

"MR. LIBOWITZ (Defense Counsel): I have no other questions.

THE COURT: Do you want to be heard? I have to rule on the admissibility of the statement made to the officer by Mr. Raley.

MR. SEIBERT (Assistant State's Attorney): Yes, Sir.

THE COURT: I am ready to rule on it.

MR. SEIBERT: Your Honor, I would use *Richardson v. State*, where a police officer, 6 Maryland App., 448 -

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THE COURT: How about 2 Maryland App., *Carswell v. State*?

MR. SEIBERT: That is just as good. In this particular case, after the *Miranda* rights were read".

After stating his reasons, the judge overruled appellant's objection to the admissibility of the confession. The court then recessed for ten minutes, after which the following occurred:

"THE COURT: Bring in the Jury. All right Gentlemen.

MR. SEIBERT: I will restate the question. Q. The question is this, Officer -

THE COURT: Mr. Libowitz will object and I will rule again.

Q. Now, what if anything, did the Defendant, Mr. Raley, say to you in the kitchen at the time you were there looking for the chalk?

MR. LIBOWITZ: Objection.

THE COURT: Overruled. The reason is the same I gave before, which is in the record.

A. (by the witness) When Mr. Raley stated to me he just blurted it out. He said 'they both came out of the kitchen' and that he shot them both, and "that they didn't belong there like that."

At no time did appellant or his counsel indicate in any way that he wished to present any witnesses or testify himself on the issue of the admissibility of the oral

statement. Had he intended to do so, he should have made his wishes known to the court. We think he had ample opportunity to make his wishes known to the court. There is, of course, no indication that had he done so he would not have been allowed to testify himself or present witnesses on his behalf on the issue then before the court. We observe that even after the trial resumed in the presence of the jury, appellant offered no evidence bearing on the voluntariness of his confession, an issue ultimately for the jury to resolve after the judge's initial ruling on the matter. We note further that appellant in this appeal gives us no inkling of the nature or content of the testimony he claims he was denied. In sum, we find no irregularity in the proceeding about which the appellant has reason to complain on appeal.

IV.

Appellant finally attacks his twenty year sentence for assault and his fifteen year consecutive sentence for the handgun violation as being an abuse of discretion and cruel and unusual punishment and therefore violative of his rights under both the Maryland Declaration of Rights and the United States Constitution.

As we understand the argument it is two-pronged. *First*, he contends the sentences were so disproportionate to the offenses as to evidence an abuse of discretion and to constitute cruel and unusual punishment forbidden by the Maryland Declaration of Rights and the United States Constitution. *Second*, he contends that having been found not guilty of assault with intent to murder his wife, the sentence for the lesser included offense of assault could not legally exceed fifteen years, the maximum then provided by law for the greater offense. We find no merit in either contention.

As to the first, the imposition of sentence in a criminal case is a matter within the province of the trial judge, *Gleaton v. State*, 235 Md. 271, 277 (1964); *Reid v. State*, 200 Md. 89, 92 (1952), *cert. denied*, 344 U.S. 848 (1952). And if the sentence is within the limits prescribed by law, it ordinarily may not be reviewed on appeal. *Gleaton v. State*, *supra*; *Biles v. State*, 230 Md. 537, 538 (1964). Assault is a common law crime for which no statutory limit governing punishment is prescribed and there was no limitation at common law. *Heath v. State*, 198 Md. 455, 467 (1951). As indicated by the Court in *Heath*, quoting from 2 Bishop, *Criminal Law* (9th ed. p. 32), the determination of the length of sentence for assault is left to the discretion of the trial court and "it has been the judicial habit to look upon assaults as more or less aggravated by such attendant facts as appealed to the discretion for a heavy penalty.*** An assault is deemed to be more or less enormous according to the facts of the particular case". In the present case, we think the circumstances were such as to bring the assault well within the definition of "enormous" and "aggravated". In passing sentence the trial judge was not required to remain oblivious to evidence of appellant's obvious involvement in the more serious crimes with which he was charged, even though that involvement in the mind of the jury was less than necessary to convict him of those charges. See *Henry v. State*, 273 Md. 131, 149-151 (1974). Nor is there any indication that in determining the sentences the judge was motivated by passion, ill will, prejudice, or any other motive than that of a sense of public duty. Under all the circumstances we cannot say that he abused his discretion or that the sentences were cruel and unusual. See *Smith v. State*, 23 Md. App. 177, 180 (1974), holding that "it is firmly established that punishment is not cruel and unusual because sentences are imposed to run consecutively. *Bieber v. State*, 8 Md. App. 522, 548". See also *Wilkins v. State*, 5 Md. App. 8, 22 (1968), and cases there cited, upholding against constitutional attack twenty year sentences for assault and battery.

As to appellant's second contention, concerning the legality of the twenty year sentence for assault, we think *Roberts v. Warden*, 242 Md. 461 (1966) is dispositive. In that case the Court of Appeals specifically rejected an identical contention as being "without substantive merit". Quoting from *Gleaton v. State*, *supra*, the Court said, at pp. 460-461:

"There is ***in this State no statutory limitation on the penalty which may be imposed for simple assault, and there was none at common law. *Heath v. State*, 198 Md. 455, 467, 85 A.2d 43 (1951); *Apple v. State*, 190 Md. 661, 668, 59 A.2d 509 (1948). Nor do we construe the penal limits imposable for the statutory assaults as implying a legislative policy to confine sentences for common law assault to not more than those prescribed for the statutory assaults. Statutes in derogation of the common law are strictly construed, and it is not to be presumed that the legislature by creating statutory assaults intended to make any alteration in the common law other than what has been specified and plainly pronounced. *Dwarris on Statutes*, 695. The matter of imposing sentences is left to the sound discretion of the trial court, and the only restraint on its power to fix a penalty is the constitutional prohibitions against cruel and unusual penalties and punishment found in Articles

16 and 25 of the Maryland Declaration of Rights." (Emphasis added.)

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JUDGMENTS AFFIRMED.

² The record indicates that pursuant to Md. Rule 762 there is still pending before a three-judge Review Panel the matter of appellant's sentences. If this is so, our rejection on this appeal of appellant's contentions concerning his sentences should not be construed as determinative of that panel's decision in the matter, for our scope of review is limited by the general rule "that the imposition of sentence is within the discretion of the trial judge and, if within the statutory limits, will not be disturbed on appeal in the absence of a showing that it was dictated, not by a sense of public duty, but by passion, ill will, prejudice or other unworthy motive". *Smith v. State*, 23 Md. App. 177, 180 (1974). While such factors are properly to be considered by the review panel, its scope of review is not so limited, the application being addressed to the wide discretion of the panel in determining the appropriateness of the sentences. To modify a sentence, the review panel need not find that the sentencing judge abused his discretion, only that it does not agree that the sentence was appropriate under all the circumstances, including the accused's background and prior criminal record.

APPENDIX B

STATUTES INVOLVED

HANDGUNS

§36B. Wearing, carrying or transporting handgun; unlawful use in commission of crime.

(a) *Declaration of policy.*—The General Assembly of Maryland hereby finds and declares that:

(i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involve the use of handguns;

(ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity;

(iii) The laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime; and

(iv) Further regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of its citizens.

(b) *Unlawful wearing, carrying, or transporting of handguns.*—Any person who shall wear, carry, or transport any handgun, whether concealed or open, upon or about his person, and any person who shall wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle traveling upon the public roads, highways, waterways, or airways or upon roads or parking lots

generally used by the public in this State shall be guilty of a misdemeanor; and it shall be a rebuttable presumption that the person is knowingly transporting the handgun; and on conviction of the misdemeanor shall be fined or imprisoned as follows:

(i) If the person has not previously been convicted of unlawfully wearing, carrying or transporting a handgun in violation of this section, or of unlawfully carrying a concealed weapon in violation of §36 of this article, or of unlawfully carrying a deadly weapon on public school property in violation of §36A of this article, he shall be fined not less than two hundred and fifty (\$250.00) dollars, nor more than twenty-five hundred (\$2,500.00) dollars, or be imprisoned in jail or sentenced to the Maryland Division of Correction for a term of not less than 30 days nor more than three years, or both; provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than 90 days.

(ii) If the person has previously been once convicted of unlawfully wearing, carrying, or transporting a handgun in violation of §36B, or of unlawfully carrying a concealed weapon in violation of §36 of this article, or of unlawfully carrying a deadly weapon on public school property in violation of § 36A of this article, he shall be sentenced to the Maryland Division of Correction for a term of not less than 1 year nor more than 10 years, and it is mandatory upon the court to impose no less than the minimum sentence of 1 year; provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than three years.

(iii) If the person has previously been convicted more than once of unlawfully wearing, carrying, or transporting a handgun in violation of §36B, or of unlawfully carrying a

concealed weapon in violation of §36 of this article, or of unlawfully carrying a deadly weapon on public school property in violation of §36A of this article, or any combination thereof, he shall be sentenced to the Maryland Division of Correction for a term of not less than three years nor more than 10 years, and it is mandatory upon the court to impose no less than the minimum sentence of three years provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than 5 years.

(iv) If it shall appear from the evidence that any handgun referred to in subsection (a) hereof was carried, worn, or transported with the deliberate purpose of injuring or killing another person, the court shall impose a sentence of imprisonment of not less than five years.

(c) *Exceptions.*—(1) Nothing in this section shall prevent the wearing, carrying, or transporting of a handgun by (i) law-enforcement personnel of the United States, or of this State, or of any county or city of this State (ii) members of the armed forces of the United States or of the National Guard while on duty or traveling to or from duty; or (iii) law-enforcement personnel of some other state or subdivision thereof temporarily in this State on official business; (iv) any jailer, prison guard, warden, or guard of keeper at any penal, correctional or detention institution in this State or (v) sheriffs and temporary or full-time sheriffs' deputies, as to all of whom this exception shall apply only when they are on active assignment engaged in law enforcement; provided, that any such person mentioned in this paragraph is duly authorized at the time and under the circumstances he is wearing, carrying, or transporting the weapon to wear, carry or transport such weapon as part of his official equipment.

(2) Nothing in this section shall prevent the wearing, carrying, or transporting of a handgun by any person to

whom a permit to wear, carry or transport any such weapon has been issued under §36E of this article.

(3) Nothing in this section shall prevent any person from carrying a handgun on his person or in any vehicle while transporting the same to or from the place of legal purchase of sale, or between bona fide residence of the individual, or between his bona fide residence and his place of business, if the business is operated and substantially owned by the individual or to or from any bona fide repair shop. Nothing in this section shall prevent any person from wearing, carrying, or transporting a handgun used in connection with a target shoot, formal or informal target practice, sport shooting event, hunting, trapping, dog obedience training class or show or any organized military activity while engaged in, on the way to, or returning from any such activity. Nothing in this section shall prevent any bona fide gun collector from moving any part of all of his gun collection from place to place for public or private exhibition. However, while traveling to or from any such place or event referred to in this paragraph, a handgun shall be unloaded and carried in an enclosed case or enclosed holster.

(4) Nothing in this section shall prevent a person from wearing, carrying, or transporting a handgun within the confines of real estate owned or leased by him or upon which he resides or within the confines of a business establishment owned or leased by him. Nothing in this section shall prevent a supervisory employee from wearing, carrying, or transporting a handgun within the confines of a business establishment in which he is employed during such time as he is acting in the course of his employment and has been authorized to wear, carry, or transport the handgun by the owner or manager of the business establishment.

(d) *Unlawful use of handgun in commission of crime.*—Any person who shall use a handgun in the commission of any felony or any crime of violence as

defined in §441 of this article, shall be guilty of a separate misdemeanor and on conviction thereof shall, in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years.

(e) *Reduction or suspension of mandatory minimum sentence; probation.*—Notwithstanding any other provision of law to the contrary, including the provisions of §643 of this article, (1) except with respect to a sentence prescribed in subsection (b) (i) hereof, no court shall enter a judgment for less than the mandatory minimum sentence prescribed in this subheading in those cases for which a mandatory minimum sentence is specified in this subheading; (2) except with respect to a sentence prescribed in subsection (b) (i) hereof, no court shall suspend a mandatory minimum sentence prescribed in this subheading; (3) except with respect to a sentence prescribed in subsection (b) (i) hereof for wearing, carrying, or transporting a handgun in violation of §36B other than on public school property, no court shall enter a judgment of probation before or without verdict with respect to any case arising under this subheading, and (4) except with respect to a sentence prescribed in subsection (b) (i) hereof no court shall enter a judgment of probation after verdict with respect to any case arising under this subheading which would have the effect of reducing the actual period of imprisonment prescribed in this subheading as a mandatory minimum sentence. (1972, ch. 13, §3; 1973, chs. 61, 332.)

Effect of amendments.—Chapter 332, Acts 1973, effective July 1, 1973, substituted a period for a semicolon at the end of sub-subsection (1) of subsection (c).

**ASSAULT WITH INTENT TO MURDER,
RAVISH OR ROB**

§12. Penalties; proviso as to assault with intent to rape.

Every person convicted of the crime of an assault with intent to have carnal knowledge of a female child under the age of 14 years, or with intent to rob shall be guilty of a felony and shall be sentenced to confinement in the Maryland Penitentiary for not less than two years or more than ten years; every person convicted of the crime of an assault with intent to murder shall be guilty of a felony and shall be sentenced to confinement in the Maryland Penitentiary for not less than two years nor more than fifteen years; and every person convicted of the crime of an assault with intent to commit a rape shall be guilty of a felony and shall be punished with death, or, in the discretion of the court, he shall be sentenced to confinement in the penitentiary for the period of his natural life, or he shall be sentenced to confinement in the penitentiary for not less than two years nor more than twenty years; provided, however, that the jury before whom any person indicted for the crime of an assault with intent to commit a rape shall be tried, if they find such person guilty thereof, may add to their verdict the words "without capital punishment", in which case the sentence of the court shall not exceed twenty years in the penitentiary, and in no case where a jury shall have rendered a verdict in manner and form as hereinbefore prescribed, "without capital punishment", shall the court in imposing the sentence, sentence the convicted party to pay the death penalty or to be confined for more than twenty years in the penitentiary. Nothing in this section as hereby amended shall be construed or held to effect or control any violation of this section occurring prior to June 1, 1949, or the prosecution thereof, but each such violation and prosecution thereof shall be governed by the provisions of the section as it read and was in effect at the time such violation

occurred. (An. Code, 1951, §14; 1939, §13; 1924, §17; 1912, §17; 1904, §17; 1888, §16; 1809, ch. 138, §4; 1904, ch. 76; 1908, ch. 366; 1931, ch. 449; 1941, ch. 722; 1943, ch. 402; 1949, ch. 196.)

PISTOLS

§441. Definitions.

(a) As used in this subtitle—

(b) The term “*person*” includes an individual, partnership, association or corporation.

(c) The term “*crime of violence*” means abduction; arson; burglary, that twelve inches in length, including signal, starter, and blank pistols.

(d) The term “*dealer*” means any person engaged in the business of selling firearms at wholesale or retail, or any person engaged in the business of repairing such firearms.

(e) The term “*crime of violence*” means abduction; arson; burglary, including common-law and all statutory and storehouse forms of burglary offenses; escape; housebreaking; kidnapping; manslaughter, excepting involuntary manslaughter; mayhem; murder; rape; robbery; and sodomy; or an attempt to commit any of the aforesaid offenses; or assault with intent to commit any other offense punishable by imprisonment for more than one year.

(f) The term “*fugitive from justice*” means any person who has fled from a sheriff or other peace officer within this State, or who has fled from any state, territory or the District of Columbia, or possession of the United States, to avoid prosecution for a crime of violence or to avoid giving testimony in any criminal proceeding. (An. Code, 1951, §538; 1941, ch. 622, §531A; 1966, ch. 502, §1.)

Cross reference.—As to machine guns, see §372 et seq. of this article.

Stated in United States v. Wolfe, 303 F. Supp. 671 (D. Md. 1969).

MAIMING

§384. Mayhem; tarring and feathering.

Every person, his aiders and abettors, who shall be convicted of the crime of mayhem, or of tarring and feathering, shall be sentenced to the penitentiary for not more than ten years nor less than eighteen months. (An. Code, 1951, §451; 1939, §433; 1924, §351; 1912, §317; 1904, §292; 1888, §187; 1809, ch. 138, §4.)

§385. Malicious injury to tongue, nose, eye, lip, limb, etc.

Every person, his aiders, abettors and counsellors, who shall be convicted of the crime of cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting or biting off the nose, ear or lip, or cutting or biting off or disabling any limb or member of any person, of malice aforethought, with intention in so doing to mark or disfigure such person, shall be guilty of a felony and upon conviction thereof be sentenced to the penitentiary for not less than two nor more than ten years. (An. Code, 1951, §452; 1939, §434; 1924, §352; 1912, §318; 1904, §293; 1889, §188; 1809, ch. 138, §4; 1966, ch. 628, §1.)

Editor's note.—Section 2 of ch. 628, Acts 1966, provides that the act shall not apply to crimes committed before June 1, 1966.

§386. Unlawful shooting, stabbing, assaulting, etc., with intent to maim, disfigure or disable or to prevent lawful apprehension.

If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, or shall assault or beat any person, with intent to maim, disfigure or disable such person, or with intent to prevent the lawful apprehension or detainer of any part for any offense for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of a felony and, upon conviction thereof be punished by confinement in the penitentiary for a period not less than eighteen months nor more than ten years. (An. Code, 1951, §453; 1939, §435; 1924, §353; 1912, §319; 1904, §294; 1888, §189, 1853, ch. 99, § 1; 1966, ch. 628, §1.)

Editor's note.—Section 2 of ch. 628, Acts 1966, provides that the act shall not apply to crimes committed before June 1, 1966.

MANSLAUGHTER

§387. Manslaughter generally.

Every person convicted of the crime of manslaughter shall be sentenced to the penitentiary for not more than ten years or in the discretion of the court may be fined not more than five hundred dollars, or be imprisoned in jail for not more than two years, or be both fined and imprisoned in jail. (An. Code, 1951, § 454; 1939, §436; 1924, §354; 1912, §320; 1904, §295; 1888, §190; 1864, ch. 39.)

Rule 756. Advisory Instructions.

a. Request for—Written—Copies.

At the close of the evidence, the State and any defendant may file with the court written requests that the court instruct the jury as set forth in such requests, and shall furnish to all other parties copies thereof.
(Rule 739 a.)

b. How Given.

The court may and at the request of any party shall, give such advisory instructions to the jury as may correctly state the applicable law; the court may give its instructions either orally or in writing. The court need not grant any requested instruction if the matter is fairly covered by the instructions actually given. The court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only.
(Rule 739 b.)

c. Summation or Reference to Evidence.

In giving any advisory instructions under section b of this Rule, the court may make such summation of or reference to the evidence as may be appropriate in order to present clearly to the jury the issue to be decided by them; provided the court instructs the jury that they are the judges of the facts and that it is for them to determine the weight of the evidence and the credit to be given to the witnesses.
(Rule 739 c; amended Sept. 26, 1957.)

d. Ruling on Request for Instructions.

Where the court's charge is not delivered until after the argument of counsel to the jury, the court shall, in advance

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of such argument, advise counsel of its proposed action on the request for instructions and the substance of the instructions which it proposes to give.
(Rule 739 d.)

e. When Instructions Given.

The court may give its instructions at any time after the close of the evidence. The giving of such instructions prior to the argument of counsel shall not preclude counsel from arguing to the contrary.
(Rule 739 e.)

f. Objection.

If a party has an objection to any portion of any instruction given, or to any omission therefrom, or to the failure to give any instruction, he shall before the jury retires to consider its verdict make such objection stating distinctly the portion, or omission, or failure to instruct to which he objects and the ground of his objection. Opportunity shall be given to make the objection in open court out of the hearing of the jury upon application either orally or in writing, made before or after the conclusion of the charge.
(Cf. Rule 739 f.)

g. Appeal.

Upon appeal a party assigning error in the instructions may not assign as of right an error unless (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct was distinctly objected to before the jury retired to consider its verdict and (2) the grounds of objection were stated at that time. Ordinarily no other error will be considered by the Court of Appeals or the Court of Special Appeals, but the appellate court, either of its own motion or upon the suggestions of a party may take cognizance of and correct any plain error in the instructions, material to the rights of the accused

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even though such error was not objected to as provided by section f of this Rule.
(Rule 739 g; G.R.P.P. Pt. Four, I, Rule 6; amended June 23, 1967, effective Sept. 1, 1967.)

APPENDIX C

DECREE ENTERED BY
MARYLAND COURT OF APPEALS
ON NOVEMBER 30, 1976

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

MANDATE
COURT OF SPECIAL APPEALS OF MARYLAND
NO. 800, September Term, 1975
Issued October 11, 1976

STATEMENT OF COSTS:

In Circuit Court:

Record	25.00
Stenographer's Costs	532.00

In Court of Special Appeals:

Filing Record on Appeal	20.00
Printing Brief for Appellant	Not supplied
Reply Brief	
Portion of Record Extract-Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	Not supplied
Portion of Record Extract-Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this eleventh day of October A.D. 1976

/s/ Julius A. Ramano
Clerk of the Court of Special
Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.
